Public Prosecutor v Ridzuan Kok bin Abdullah

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45-16-1993
ABDUL MALIK ISHAK J
27 MARCH 1995

Criminal Procedure *— Charge — Joinder of — Two separate charges — Trafficking of drugs and possession of drugs — Alleged offences committed at the same time and same place — Whether distinct offences — Whether same transaction — Whether charges could be tried together — Court's discretion — Criminal Procedure Code (FMS Cap 6) s 165(i) — Dangerous Drugs Act 1952 ss 6 & 39B*

The accused in this case was charged with the offences of drug trafficking under s 39B of the Dangerous Drugs Act 1952 ('the DDA'), and for being in possession of drugs under s 6 of the DDA, under two separate charges. At the commencement of the hearing of the first charge, the deputy public prosecutor applied to the court for both charges to be heard together, on the ground that the alleged offences were committed in a series of acts so closely connected together as to form the same transaction, as both the offences were committed at the same time and same place. However, the defence counsel raised a preliminary objection that the joinder of charges would result in a miscarriage of justice, as evidence which would prejudice the fair trial of the accused would be brought in. The question for determination by the court was whether the two offences could be tried together.

Held, disallowing the preliminary objection:

(1) Section 163 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') sets out the general rules that every distinct offence must be embodied in a separate charge, and that every accused should be charged and tried separately for every distinct offence.

(2) If two or more distinct offences are mentioned in the same charge, the charge is bad for duplicity, which is an illegality that cannot be cured under s 422 of the CPC. It follows that any conviction that has been made under it cannot be sustained.

(3) However, pursuant to s 165(i) of the CPC, two or more offences which are committed by the same accused may be tried together if the acts committed are so connected as to form the same transaction. As a guide, the acts would form the same transaction if there is proximity of time, proximity of place, continuity of action and community of purpose or design between the two alleged offences.

(4) It is entirely at the discretion of the court to decide whether to allow the offences to be tried together or otherwise, at the time when the charges are framed.

(5) In the present case, the court would order the joinder of charges, as both the offences were committed at the same time and same place, there was continuity of action and community of purpose or design, thus forming part of the same transaction. The trial could also be expedited as the deputy public prosecutor would be calling the same witnesses for both offences.

[Bahasa Malaysia summary

Tertuduh di dalam kes ini telah dipertuduh dengan kesalahan kerana mengedar dadah di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB'), dan kerana memiliki dadah di bawah s 6 ADM, di bawah dua pertuduhan yang berasingan. Pada permulaan pembicaraan pertuduhan pertama, timbalan pendakwa raya telah memohon kepada mahkamah supaya kedua-dua pertuduhan tersebut dibicarakan bersama, atas alasan bahawa kesalahan-kesalahan yang dinyatakan itu telah dilakukan dalam satu siri perbuatan yang begitu rapat hubungannya sehingga membentuk suatu urus niaga yang sama, oleh kerana kesalahan-kesalahan tersebut dilakukan pada masa dan tempat yang sama. Walau bagaimanapun, peguambela telah menimbulkan suatu bantahan permulaan, bahawa percantuman pertuduhan tersebut akan mengakibatkan suatu salah laksana keadilan, kerana keterangan yang akan memudaratkan perbicaraan yang adil akan dibawa masuk. Soalan yang perlu dipertimbangkan oleh mahkamah ialah sama ada kedua-dua kesalahan itu boleh dibicarakan bersama atau tidak.

Diputuskan, tidak membenarkan bantahan permulaan tersebut:

(1) Sekyen 163 Kanun Prosedur Jenayah (NMB Bab 6) ('KPJ') telah memperuntukkan rukun umum bahawa setiap kesalahan berlainan hendaklah dikandung dalam pertuduhan yang berasingan, dan bahawa setiap tertuduh harus dipertuduh dan dibicarakan secara berasingan bagi setiap kesalahan berlainan.

(2) Jika dua atau lebih kesalahan yang berlainan dinyatakan di dalam pertuduhan yang sama, pertuduhan tersebut cacat akibat kependuaan, yang merupakan suatu kepenyalahan undang-undang yang tidak dapat dibetulkan di bawah s 422 KPJ. Maka, sebarang sabitan yang telah dibuat di bawah pertuduhan tersebut tidak dapat dikekalkan.

(3) Walau bagaimanapun, menurut s 165(i) KPJ, dua atau lebih kesalahan yang dilakukan oleh tertuduh yang sama boleh dibicarakan bersama, jika perbuatan yang telah dilakukan itu adalah begitu berhubungkait hinggakan membentuk urus niaga yang sama. Sebagai suatu panduan, perbuatan-perbuatan tertentu akan membentuk urus niaga yang sama jika terdapat kedekatan masa, kedekatan tempat, keberterusan tindakan dan kesamaan tujuan atau niat di antara kedua-dua kesalahan yang dinyatakan tersebut.

(4) Mahkamah mempunyai budi bicara yang sepenuhnya untuk memutuskan sama ada untuk membenarkan kesalahan tersebut dibicarakan bersama atau tidak, pada masa pertuduhan tersebut dibuat.

(5) Dalam kes ini, mahkamah akan mengarahkan percantuman pertuduhan kerana kedua-dua kesalahan telah dilakukan pada masa dan tempat yang sama, terdapat keberterusan tindakan dan kesamaan tujuan atau niat, dan dengan itu, membentuk urus niaga yang sama. Perbicaraan juga akan dipercepatkan kerana timbalan pendakwa raya akan memanggil saksi yang sama bagi kedua-dua kesalahan tersebut.]

Notes

For cases on joinder of charges, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 819–860.

Cases referred to

Ali Hussain v Emperor AIR 1933 Cal 308 (refd)
Amrita Lal Hazra & Ors v Emperor (1915) 42 Cal 957 (folld)
Babulal Chaukhani v King Emperor AIR 1938 PC 130 (folld)
Chin Choy v PP [1955] MLJ 236 (folld)
Choragudi Venkatadri v Emperor (1910) ILR 33 Mad 502 (refd)
Emperor v Sherufalli Allibhoy (1903) ILR 27 Bom 135 (refd)
Jagar Singh v PP [1936] MLJ Rep 114 (folld)
Krishnaji Anant Dange & Anor v Emperor AIR 1932 Bom 277 (folld)
Lim Ong Lum v R [1926] SSLR 152 (folld)
Lim Sing Hiaw v PP [1965] 1 MLJ 85 (folld)
Muthan v PP [1947] MLJ 86 (folld)
Ali & Anor v Sidney Mitchell & Co (a firm) & Ors [1978] 3 All ER 1033; [1978] 3 WLR 849 (refd)
Sanjiv Ratnappa v Emperor AIR 1932 Bom 545 (refd)
Yap Liow Swee v PP [1937] MLJ 225 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 163, 165, 422
Dangerous Drugs Act 1952 ss 4, 5, 6, 7, 39B
Penal Code (FMS Cap 45) ss 323, 353, 392, 394
Penal Code s 330 [Ind]

Azman bin Abdullah (Deputy Public Prosecutor) for the Public Prosecutor.

Hisham Teh Poh Teik (*Teh Poh Teik & Co*) for the accused.

Abdul Malik Ishak J: The preliminary objection was well argued by both parties. At the conclusion of the hearing, I disallowed the preliminary

objection and stated that I would give my reasons in writing for so doing. I now proceed to do so.

The accused was charged before me on the following amended charge:

> Bahawa kamu pada 25 Disember 1992, jam lebih kurang 1.45 pagi di sebuah rumah di alamat No 5, Jalan Rantai 5, Taman Kobena, Tampoi, dalam Daerah Johor Bahru, dalam Negeri Johor telah didapati mengedar 216.34g cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah s 39B(2) Akta yang sama.

At the commencement of the hearing, the learned deputy public prosecutor applied for the trial to proceed together with the case registered in the Magistrates' Court, Johor Bahru vide case No 83–38–93, against the same accused on the following amended charge:

> Bahawa kamu pada 25 Disember 1992, jam lebih kurang 1.45 pagi, di rumah No 5, Jalan Rantai 5, Taman Kobena, Tampoi, dalam daerah Jobor Bahru, dalam Negeri Johor, bukan sebagai seorang yang diberi kebenaran di bawah s 4, 5 atau 7 Akta Dadah Berbahaya 1952, telah didapati memiliki cannabis sejumlah berat bersih 2.96g dan dengan itu kamu telah melakukan satu kesalahan, dan boleh dihukum di bawah s 6 Akta Dadah Berbahaya 1952.

The learned deputy public prosecutor argued that both these two charges should be heard together to save time, because the offences were committed in a series of acts so closely connected together as to form the same transactions. Encik Hisham Teh Poh Teik argued to the contrary and strenuously objected to the application, and by way of a preliminary objection, submitted that prejudicial evidence ought not to be brought in as it would prejudice the fair trial of the accused; he feared that the joinder of offences would result in a miscarriage of justice.

To go back to basic principles, it is germane to state that s 163 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') sets out clearly two general rules, and it bears repetition to state them as follows. First, every distinct offence must be embodied in a separate charge. Secondly, every accused person should be charged and tried separately for every distinct offence. It is not out of place to state the rationale for the first rule to be to enable the accused to prepare his defence, and for the court to ensure that only relevant evidence to the charge would be adduced; and the rationale for the second rule is to prevent a multitude of charges to be tried together coupled with the inconvenience of hearing several distinct offences together.

What are distinct offences? The best example available is found in the illustration to s 163 of the CPC, where causing grievous hurt and theft are said to be distinct offences. The categories of distinct offences are not closed and it is difficult to itemize them one by one. To catalogue them is next to impossible, but what is certain is this: distinct offences would arise

in situations where offences were committed against different persons or victims, where offences were committed at different times, or on different and separate occasions, and where offences falling under different sections of the Penal Code or under different penal statute. These examples bring to the forefront the question of duplicity of charges, which may arise when two or more distinct offences are mentioned in a charge. I need briefly say that where a charge is bad for duplicity, it constitutes an illegality which cannot be cured under s 422 of the CPC (see *Jagar Singh v PP* [1936] MLJ Rep 114, *Yap Liow Swee v PP* [1937] MLJ 225 and *Muthan v PP* [1947] MLJ 86).

Now, reverting back to the case at hand, the learned deputy public prosecutor was obviously concerned as can be seen from the tenor of his submission that the trial before me be proceeded legally and that its legality was uppermost in his mind. That is quite understandable. *Chin Choy v PP* [1955] MLJ 236 is the authority for the proposition that where charges are tried together in contravention of any of the provisions of the CPC, there is an illegality which cannot be cured, and that any convictions had under it cannot be sustained.

The question for determination is whether the two offences, one under s 39B of the Dangerous Drugs Act 1952 ('the DDA') and the other under s 6 of the DDA, can be heard and tried together. Section 165(i) of the CPC lays down the requirements that there is one accused person, that the offences are committed in a series of acts, that the acts are so connected together as to form the same transaction and, lastly, there are more than one offence. To construe whether a number of acts may be so connected together as to form part of the same transaction, it is essential to show community of purpose or design *and* continuity of action. It is appropriate to say that there is no definite formula which may be applied in all situations to determine whether two or more acts form the same transaction. The best formula is perhaps what was laid down in *Amrita Lal Hazra & Ors v Emperor* (1915) 42 Cal 957, especially at p 983 to the effect that:

> It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

Of course, on the authority of *Babulal Chaukhani v King Emperor* AIR 1938 PC 130, it is at the time when the charge is framed that the court must determine whether the acts were committed in the same transaction or not, and this exercise cannot be made at the end of the trial.

It is entirely in the discretion of the court to decide whether to allow the offences to be tried together or otherwise. I am fortified that this discretionary power is given to the court by a passage appearing in the judgment of Thomson LP (as he then was) in *Lim Sing Hiaw v PP* [1965] 1 MLJ 85, FC where his Lordship said at p 88:

> Nevertheless the question of joint or separate trial of charges is, within the limits of the Criminal Procedure Code, a matter within the discretion of the trial judge and is to be decided in the light of the particular circumstances of each individual case.

Section 165(ii) of the CPC relates to a situation where the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being. This envisages the situation where the solitary accused may be charged with and tried at one trial for each of such offences. Thus, as an example when Ali wrongfully strikes Bakar with a stick, Ali may be separately charged with and convicted of offences under ss 353 and 323 of the Penal Code (FMS Cap 45) at one trial (see an old case of *Lim Ong Lum v R* [1926] SSLR 152, which lays down an old principle that the court is at liberty to impose a punishment for each offence provided that the total amount of punishment does not exceed the maximum for any one of the offences).

Section 165(iii) of the CPC refers to situations where one or more than one act would by itself or themselves constitute an offence, and when combined would form a different offence. Here, the solitary accused may be charged with and tried at one trial for the offence constituted by such acts when combined, or for any offence constituted by any one or more of such acts. As an example, Ali commits robbery on Bakar, and in so doing voluntarily causes hurt to Bakar. Ali may be separately charged with and tried at one trial and convicted of offences under s 323, s 392, and s 394 of the Penal Code (FMS Cap 45).

An examination of Indian cases will now follow to show what acts are so connected together as to form part of the same transactions.

Mallik J, in *Ali Hussain v Emperor* AIR 1933 Cal 308 said:

> To determine whether or not a series of acts would form parts of the same transaction the most important points to be considered are whether there was a common purpose and design and continuity of action.

I venture to add that the mere fact that there may have been a common purpose does not constitute a transaction (see *Krishnaji Anant Dange & Anor v Emperor* AIR 1932 Bom 277). In *Choragudi Venkatadri v Emperor* (1910) ILR 33 Mad 502, Abdul Rahim J said:

> ... in a certain class of cases — the present case is alleged to be within that category — community of purpose or design and continuity of action are essential elements of the connection necessary to link together different acts into one and the same transaction.

The phrase 'common purpose', seems to be used widely and in a wide sense in India. This is clearly reflected in *Sanjiv Ratnappa v Emperor* AIR 1932 Bom 545, where causing hurt to extort a confession contrary to s 330 of the Indian Penal Code, and altering a diary, forgery, in order to save the extorter from the consequences of his own acts were held to be parts of the same transaction. His Lordship Baker J, after reviewing some authorities

said, '... there must be continuity of action and purpose in order that the acts may form the same transaction'.

Chandavarkar J in *Emperor v Sherufalli Allibhoy* (1903) ILR 27 Bom 135 puts it in a different way when he said that:

> The real and substantial test, then, for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action.

It is not surprising that judges in India as well as in Malaysia are capable of giving rival views on the same subject matter. Lord Wilberforce in *Saif Ali & Anor v Sidney Mitchell & Co (a firm) & Ors* [1978] 3 All ER 1033 at p 1037; [1978] 3 WLR 849 at p 854 tersely said that:

> Judges are more than mere selectors between rival views: they are entitled to and do think for themselves.

For my part, I prefer the test laid down in *Amrita Lal Nazra & Ors v Emperor,* and applying the test to the facts of the present case, the position would be as follows:

(1) *Proximity of time*

From the charges, the learned deputy public prosecutor argued, quite rightly, that both the offences were committed on 25 December 1992, at about 1.45am and, thus, it can safely be said that the offences were committed at the same time.

(2) *Unity or proximity of place*

It is part and parcel of the prosecution's case that both the offences were committed at house No 5, Jalan Rantai 5, Taman Kobena, Tampoi, Johor Bahru. Put shortly, tbe offences were committed at the same place.

(3) *Continuity of action*

Clearly from the charges, both the offences were different, but since it happened at the same time and in the same place against the same accused, there was continuity of action. On this point, the learned deputy public prosecutor stated that the evidence would be closely interrelated to one another and hence, it necessitates a joint trial.

(4) *Community of purpose or design*

It was the learned deputy public prosecutor's submission that the possession of 2.96g of cannabis was related to the trafficking of 216.34g of cannabis as both offences were committed at the same time and place as to form part and parcel of the same transaction.

The learned deputy public prosecutor pressed the point further and argued that he would be calling the same witnesses for both offences, thereby

saving time and expenses, and expedite the trial. It would, in the circumstances, be a miscarriage of justice not to order the joinder of offences.

For the aforesaid reasons, I set aside the preliminary objection and ordered the trial to proceed on both charges against the accused under s 165 of the CPC.

Order accordingly.

Reported by Isabel Liong